Goh Kein Hooi v OCBC Bank (M) Bhd and another appeal

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-03(IM)-1–01 OF 2012 AND J-03(IM)-2–01 OF 2012
ABDUL MALIK ISHAK, CLEMENT SKINNER AND ALIZATUL KHAIR JJCA
8 MAY 2013

B

C

Civil Procedure — Appeal — Bankruptcy — Application to set aside bankruptcy notice or service of bankruptcy notice — Application to set aside creditors' petition or service of creditors petition — Application dismissed — Appeal against decision of senior assistant registrar to judicial commissioner — Whether calculation of interest consistent with terms of judgment — Whether judicial commissioner erred — Whether order for substituted service of notice and order for substituted service of petition void — Bankruptcy Act 1967 s 5(1)(a)

D

The appellant had filed a summons in chambers to set aside the bankruptcy notice ('BN') or the service of the BN, and the creditors' petition ('CP') or the service of the CP. Simultaneously, the appellant also filed an affidavit in opposition to the CP. The senior assistant registrar ('SAR') dismissed the appellant's summons in chambers and the appellant's opposition to the CP and proceeded to grant the respondent's application for a receiving order and an adjudicating order against the appellant. The appellant did not lodge an appeal against the dismissal of the summons in chambers within the prescribed time and abandoned any appeal in regard to it. However, the appellant appealed to the judge in chambers against the dismissal of the appellant's opposition to the CP and the granting of the receiving and adjudicating orders. The judicial commissioner dismissed the appellant's appeal. This was an appeal against the decision of the judicial commissioner in dismissing the appellant's appeal against the decision of the SAR. The issues that arose were whether the calculation of interest in the BN was consistent with the terms of the judgment; whether the judgment debt stated in the BN differed from the judgment debt as stated in the judgment creditor's statement of account; whether the JC stated in the petition that the borrower had charged its property as security for the loan; whether the order for the substituted service of the BN and the order for the substituted service of the CP were void; and whether the name and address of the solicitors for the JC was stated in the advertisement for the substituted service of the BN and the CP, respectively.

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I

Held, dismissing the appeals:

(1) The JD alleged that there was an excess of RM6,509.67 claimed in the BN. The BN had been issued in respect of a judgment debt to the tune of

RM3,543,401.80. Even if the sum of RM6,509.67 were deducted from the judgment debt claimed, the amount would still exceed the statutory minimum of RM30,000 as stipulated in s 5(1)(a) of the Bankruptcy Act 1967. The courts, in construing bankruptcy notices, have been inclined to apply the strict construction to the legislative words creating the act of bankruptcy. Bankruptcy had all along been a creature of statute. The courts were inclined to construe the legislative words strictly (see paras 12–13).

(2) It was apparent that the JD was trying to confuse the court by referring to the statement of account without disclosing the fact that the borrower had taken several loan facilities from the JC bank and that the statement of account referred to only a part of the loan facilities. It was also apparent that the JD purposely failed to disclose the fact that the statement of account related only to the amount owing under the term loan facility whereas the judgment on which the BN was issued pertained to both the term loan and the overdraft facilities. The JD was content to provide half-truths or misinformation to the court and the only reasonable inference to be drawn from the conduct of the JD was that the JD was trying to mislead the court (see para 20).

(3) The terms of the contracts of guarantee favoured the JC. It provided that the JC had the right to demand payment from the guarantor even if the JC had not resorted to other means of payment. The JC had the option and was free to pursue all remedies available either simultaneously or successively (see paras 27 & 35).

(4) The letters of appointment were deemed to have been served on the JD. Since the JD failed to keep the appointments, he must be taken to be evading service. The JD had not produced any such certificate as required by s 90A(2) of the Evidence Act 1950. In the absence of such a certificate from the postal authority, not much weight could be attached to the computer printout that the JD had produced. The JD did not advance a concrete answer for his failure to collect the letter from the postal authority. He relied on his website search results but that was not the best evidence to rely upon. The best evidence would be the mail delivery duly returned by the postal authority with their signature, postmark and remarks concerning the attempted delivery (see paras 47 & 52).

(5) The JD clearly failed to collect the letter of appointment from the postal authority despite knowing that there was a letter for him. This was an unmistakable evidence of the JD's attempt to evade service. Given the prevailing facts, the JC had sufficient basis to make the application for substituted service. It deserved repetition to say that the JC need only make two attempts at service prior to applying for substituted service. Here, the JC in abundance of caution made three attempts. Two calls were made prior to fixing an appointment for a third call (see para 54).

(6) The JD failed to demonstrate any cogent reason in law to set aside the BN and the CP or for that matter the service thereof, or to advance any reason as to why a receiving order and an adjudicating order ought not to have been granted (see para 60).

[Bahasa Malaysia summary

Perayu telah memfailkan saman dalam kamar untuk mengetepikan notis kebankrapan ('NK') atau penyampaian NK, dan petisyen pemiutang ('PP') atau penyerahan PP. Pada masa yang sama, perayu juga memfailkan satu afidavit membantah PP. Timbalan pendaftar ('TP') menolak saman dalam kamar perayu dan bantahan perayu terhadap PP dan meneruskan dengan membenarkan permohonan responden untuk satu perintah penerimaan dan satu perintah adjudikasi terhadap perayu. Perayu tidak membuat rayuan terhadap penolakan saman dalam kamar di dalam tempoh yang diberikan dan mengabaikan sebarang rayuan mengenainya. Walau bagaimanapun, perayu merayu kepada hakim di dalam kamar terhadap penolakan bantahan perayu terhadap PP dan kebenaran perintah penerimaan dan perintah adjudikasi. Pesuruhjaya kehakiman telah menolak rayuan perayu. Ini merupakan rayuan terhadap keputusan pesuruhjaya kehakiman yang menolak rayuan perayu terhadap keputusan TP. Isu-isu yang timbul adalah sama ada pengiraan faedah di dalam NK konsisten dengan terma-terma penghakiman; sama ada hutang penghakiman yang dinyatakan di dalam NK berbeza dengan hutang penghakiman yang dinyatakan di dalam penyata akaun JC; sama ada JC menyatakan di dalam petisyen bahawa peminjam telah menggadaikan hartanya sebagai jaminan kepada pinjaman; sama ada perintah untuk penyampaian ganti NK dan perintah untuk penyampaian ganti PP adalah tidak sah; dan sama ada nama dan alamat peguamcara untuk JC dinyatakan di dalam iklan untuk penyampaian ganti NK dan PP masing-masing.

Diputuskan, menolak rayuan tersebut:

(1) JD mendakwa bahawa terdapat lebihan RM6,509.67 yang dituntut dalam NK. NK telah dikeluarkan berhubung satu hutang penghakiman berjumlah RM3,543,401.80. Walaupun sekiranya jumlah RM6,509.67 ditolak daripada hutang penghakiman yang dituntut, jumlah tersebut masih melebihi RM30,000 minima statutori seperti yang dinyatakan di dalam s 5(1)(a) Akta Kebankrapan 1967. Mahkamah, dalam mentafsirkan notis kebankrapan, cenderung untuk menggunakan pentafsiran yang lebih ketat kepada perkataan-perkataan perundangan yang mewujudkan tindakan kebankarapan. Kebankrapan selama ini merupakan rekaan statut. Mahkamah cenderung untuk mentafsirkan perkataan perundangan secara ketat (lihat perenggan 12–13).

(2) Adalah jelas bahawa JD cuba untuk mengelirukan mahkamah dengan merujuk kepada penyata akaun tanpa mendedahkan fakta bahawa peminjam telah mengambil beberapa kemudahan pinjaman daripada

bank JC dan bahawa penyata akaun yang dirujuk hanya sebahagian daripada kemudahan pinjaman. Ia juga jelas bahawa JD dengan sengaja gagal untuk mendedahkan fakta bahawa penyata akaun tersebut hanya berkait dengan jumlah terhutang di bawah kemudahan pinjaman berjangka manakala penghakiman di mana NK dikeluarkan adalah berhubung kedua-dua pinjaman berjangka dan kemudahan overdraf. JD berpuas hati dengan mengemukakan separuh kebenaran atau maklumat salah kepada mahkamah dan anggapan munasabah yang boleh disimpulkan daripada tindakan JD ialah bahawa JD cuba untuk mengelirukan mahkamah (lihat perenggan 20).

(3) Terma-terma kontrak jaminan berpihak kepada JC. Ia menyatakan bahawa JC mempunyai hak untuk menuntut bayaran daripada penjamin meskipun JC tidak cuba mendapatkan bayaran dengan cara lain. JC mempunyai pilihan dan bebas untuk meneruskan semua remedi yang ada sama ada secara serentak atau berturut-turut (lihat perenggan 27 & 35).

(4) Surat-surat perlantikan dikatakan telah diserahkan kepada JD. Memandangkan JD gagal untuk menepati temujanji, dia dianggap mengelakkan penyampaian. JD tidak mengemukakan sebarang sijil seperti yang diperlukan oleh s 90A(2) Akta Keterangan 1950. Dengan ketiadaan sijil tersebut daripada pihak berkuasa pos, tidak banyak beban yang boleh dikenakan kepada cetakan computer yang dikemukakan oleh JD. JD tidak mengemukakan jawapan konkrit untuk kegagalannya mendapatkan surat daripada pihak berkuasa pos. Dia bergantung kepada carian laman sesawang tetapi itu bukanlah keterangan terbaik yang boleh dipergantungkan. Keterangan terbaik ialah penghantaran surat yang dikembalikan sewajarnya oleh pihak berkuasa pos dengan tandatangan mereka, tanda pos dan kenyataan mengenai cubaan penghantaran (lihat perenggan 47 & 52).

(5) JD secara terang-terangan gagal untuk mendapatkan surat pelantikan daripada pihak berkuasa pos meskipun mengetahui bahawa terdapat sepucuk surat untuk beliau. Ini merupakan keterangan tidak boleh disangkal mengenai cubaan JD untuk mengelakkan penyampaian. Berdasarkan fakta-fakta sedia ada, JC mempunyai asas yang mencukupi untuk membuat permohonan untuk penyampaian ganti. Perlu diulang bahawa JC hanya perlu membuat dua cubaan untuk penyampaian sebelum memohon untuk penyampaian ganti. Di sini, JC dengan bersungguh-sungguh membuat tiga cubaan. Dua panggilan telah dibuat sebelum menetapkan temujanji untuk panggilan ketiga (lihat perenggan 54).

(6) JD gagal menunjukkan sebarang alasan kukuh dari segi undang-undang untuk mengetepikan NK dan PP atau untuk perkara berhubung

penyerahan atau mengemukakan sebarang alasan mengenai kenapa perintah penerimaan dan perintah adjudikasi sepatutnya tidak dibenarkan (lihat perenggan 60).]

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 1 MLJ 413; [1994] 2 CLJ 1, SC (folld)
Balakrishnan s/o Kunjamboo Nair v Savastine Anthony s/o Francis [1991] 1 CLJ 503, HC (refd)
Browning And Another, Assignees of Morgan, a Bankrupt v Stallard (1814) 128 ER 764 (refd)
Chan Boi Loi v Public Bank Bhd and another application [2011] 1 MLJ 478; [2009] 6 CLJ 81, FC (refd)
Chinery, Re, ex p Chinery [1884] 12 QBD 342, CA (refd)
Commercial Banking Co of Sydney Ltd v Patrick Intermarine Acceptances Ltd (1978) 52 ALJR 404, PC (refd)
David Lim Hong Kee v Perwira Affin Bank Bhd [2004] 1 MLJ 113; [2003] 4 CLJ 44, CA (refd)
Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd [1965] NSWR 1504 (refd)
General Surety and Guarantee Co Ltd v Francis Parker Ltd (1977) 6 BLR 16, QBD (refd)
Hongkong & Shanghai Banking Corp v Yip Kim Khoon [1991] 3 MLJ 172; [1991] 4 CLJ (Rep) 297, HC (not folld)
Joseph P Morin v The Hammond Lumber Company (1923) 1 DLR 140, SC (refd)
Jowitt v Callaghan [1938] 38 SR (NSW) 512 (refd)
KO (an infant), Re [1990] 1 MLJ 494, HC (refd)
Kong Nen Siew v Lim Siew Hong [1971] 1 MLJ 262 (refd)
Lee Chow Meng v PP [1976] 1 MLJ 287 (refd)
Lee Lip Ngee v Crown Counsel [1947] 13 MLJ 68 (refd)
Lee Weng Sang v PP [1978] 1 MLJ 168, FC (refd)
Lim Kong v PP [1962] 1 MLJ 195 (refd)
Loh Kok Huah, Re Ex P Ban Hin Lee Bank Bhd [1992] 1 MLJ 687; [1991] 3 CLJ (Rep) 183, HC (refd)
Lougher And Others v Molyneux [1916] 1 KB 718, KBD (refd)
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263, SC (refd)
Malaysia Building Society Bhd v Lim Kheng Kim & Ors [1988] 3 MLJ 175; [1988] 1 CLJ (Rep) 770, HC (refd)
Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor [1988] 2 MLJ 471; [1988] 1 CLJ (Rep) 793 (refd)
Moscow Narodny Bank Ltd v Ngan Ching Wen [2005] 3 MLJ 693; [2004] 2 CLJ 241, FC (refd)
Pang Ah Chee v Chong Kwee Sang [1985] 1 MLJ 153, FC (refd)

A *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30, SC (refd)
Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan [1993] 2 MLJ 423; [1993] 3 CLJ 349, SC (refd)
PP v Choo Teck Heng [1960] 1 MLJ 218 (refd)
B *Richards; Ex parte Lloyd, Official Receiver, Re* (1935) 8 ABC 37 (refd)
Standard Chartered Bank v Mukah Singh [1996] 3 MLJ 240, HC (refd)
Sunbird Plaza v Maloney (1988) 166 CLR 245, HC (refd)
Swan v The Governer and Company of the Bank of Scotland (1836) 10 Bligh NS 627, HL (refd)
C *Total Oil Products (Aust) Pty Ltd v Robinson* (1970) 1 NSWR 701 (refd)
Tunku Abdul Jalil Ibni Tunku Osman, Ex parte Malayan Banking Berhad, Re [2010] 1 LNS 21, HC (folld)
Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd [1979] 1 MLJ 129, FC (refd)
D *WC Angliss Co (Aust) Pty Ltd* (1935) 8 ABC 37 (refd)
Western Dominion Investment Co v MacMillan (1925) 2 DLR 442, CA (refd)
Yeoman Credit Ltd v Latter & Anor [1961] 1 WLR 828, CA (refd)
Yong Pak Yong v PP [1959] 1 MLJ 176 (refd)

E **Legislation referred to**
Bankruptcy Act 1967 ss 2, 3(2)(ii), 5(1)(a), 5(2), 130
Bankruptcy Rules 1969 rr 94, 97, 110, Form 15
Contracts Act 1950 s 94
Evidence Act 1950 s 90A(2)

F
Appeal from: Bankruptcy No 29–3241 of 2009 (High Court, Johor Bahru)

Lam Wai Tze (Lam Wai Tze & Co) in both appeals for the appellants.
Clarence Edwin (Clarence Edwin Law Offices) in both appeals for the respondents.

G **Abdul Malik Ishak JCA (delivering judgment of the court):**

INTRODUCTION

H **[1]** We heard these two appeals vide J-03(IM)–1–01 of 2012 and J-03(IM)–2–01 of 2012 together since they are based on the same set of facts. The parties themselves agreed to have these two appeals to be heard together.

CIVIL APPEAL NO J-03(IM)-1–01 OF 2012

I
[2] This is an appeal against the decision of the judicial commissioner who dismissed the appellant's appeal against the decision of the senior assistant registrar ('SAR') granting a receiving order and an adjudicating order against the appellant.

[3] Before the SAR, the appellant had filed a summons in chambers to set aside (a) the bankruptcy notice ('BN') or the service of the BN, and (b) the creditors' petition ('CP') or the service of the CP. Simultaneously, the appellant also filed an affidavit in opposition to the CP.

[4] Having heard the parties, the SAR dismissed the appellant's summons in chambers and the appellant's opposition to the CP. And the SAR then granted the respondent's application for a receiving order and an adjudicating order against the appellant. The appellant did not lodge an appeal against the dismissal of the summons in chambers within the prescribed time and, finally, the appellant abandoned any appeal in regard to it.

[5] But the appellant did appeal to the judge in chambers against the dismissal of the appellant's opposition to the CP and the granting of the receiving and adjudicating orders. The judicial commissioner dismissed the appellant's appeal. Aggrieved, the appellant now appeals to this court.

[6] For convenience, the appellant will hereinafter be referred to as the 'JD' while the respondent bank will be referred to as the 'JC'.

[7] Before us, the JD advanced the following six grounds of appeal:

(a) that the calculation of interest in the BN is inconsistent with the terms of the judgment;

(b) that the judgment debt stated in the BN differs from the judgment debt as stated in the JC's statement of account dated 30 October 2009;

(c) that the JC has failed to state in the petition that the borrower has charged its property as security for the loan;

(d) that the JC has failed to state that the borrower has charged a fixed deposit of RM50,000 as security for the loan;

(e) that the order for the substituted service of the BN and the order for the substituted service of the CP are void; and

(f) that the name and address of the solicitors for the JC is not stated in the advertisement for the substituted service of the BN and the CP respectively.

THE FIRST GROUND

[8] It is the contention of the JD that the JC has failed to deny the JD's averments concerning the calculation of interest. But a perusal of the JC's

affidavit in reply in para 4.1 shows that the JC has expressly denied the JD's averments in regard to the calculation of interest. The JC acted cautiously and did not take the bait laid by the JD by going into the details pertaining to the calculations because the JD was clearly attempting to circumvent the clear statutory requirement of s 3(2)(ii) of the Bankruptcy Act 1967, which states as follows:

> 3 Acts of bankruptcy.
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> (2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:
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> Provided that a bankruptcy notice
>
> (i) may specify an agent to act on behalf of the creditor in respect of any payment or other thing required by the notice to be made to or done to the satisfaction of the creditor; and
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> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

[9] Here, the JD gave no such notice. It must be borne in mind that the JD came into the picture as early as on 14 September 2010 and that was during the stage of the creditors' petition. It has been held in *Loh Kok Huah, Re Ex P Ban Hin Lee Bank Bhd* [1992] 1 MLJ 687; [1991] 3 CLJ (Rep) 183, that a judgment debtor who seeks to invalidate a bankruptcy notice on the ground that the amount claimed therein exceeds the amount actually due must do so within the time stipulated in the bankruptcy notice for the payment to be made expeditiously. And every bankruptcy notice prescribes that the payment of the amount claimed therein must be made within seven days after the service of the notice not including the day of the service.

[10] In so far as this appeal is concerned, on the authority of the Court of Appeal case in *David Lim Hong Kee v Perwira Affin Bank Bhd* [2004] 1 MLJ 113; [2003] 4 CLJ 44, the BN was duly served based on the date of its advertisement and that would be on 12 November 2009. The JD had seven days from 13 November 2009 to challenge the amount claimed in the BN. Unfortunately, the JD did not do so. The challenge is mounted too late in the day—at the time when the CP is being heard. In fact, this was exactly what had happened in *Loh Kok Huah, Re Ex P Ban Hin Lee Bank Bhd* and His Lordship

Mohamed Dzaiddin J (later the Chief Justice of Malaysia) had this to say at pp 690 (MLJ); 184–185 (CLJ) of the report:

> Quite clearly, in the present case the debtor was aware about the application for an order for sale of the charged property of the principal debtor and ought to have applied to set aside the bankruptcy notice disputing the validity of the said notice. Yet it was only at the hearing of the creditor's petition on 20 May 1991 that he raised about the correct amount. In the circumstances, the bankruptcy notice cannot be invalidated by reason of the mistake as to the sum specified therein. To enforce my reason, I adopt the decision of the Chang Min Tat J (as he then was) in *Re Arunachalam; ex parte Indian Overseas Bank Ltd* [1968] 1 MLJ 89 at p 90:
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> > On the authorities, it seems to me reasonably clear that where an excess is claimed in the bankruptcy notice and no such notice of dispute of the validity of the notice by reason of such excess is given, then the bankruptcy notice is not invalid merely by reason of the excess.
> >
> > Where the amount claimed in the bankruptcy notice is in excess and notice, as is referred to in the proviso the s 3(2) of the Ordinance, is given within seven days after the service of the bankruptcy notice, then the excess becomes relevant and on the authorities the bankruptcy notice is invalid, since it referred to a sum in respect of which the judgment creditor could not have issued execution: In *re Child, ex parte Child* [1892] 2 QB 77.

[11] Continuing in the same page, in serious vein, His Lordship Mohamed Dzaiddin J (later the Chief Justice of Malaysia) held that even if the judgment debt had been substantially reduced, the court could still make a receiving order if the debt exceeds the statutory minimum. This was what His Lordship said (see p 690 (MLJ); p 185 (CLJ) of the report):

> Thirdly, in my opinion, where the judgment debt on which the bankruptcy petition is founded has, by the date of the hearing of the petition, been substantially reduced, this Court can still make a receiving order unless the debt was less than the statutory minimum of RM2,000 since on the true construction of s 6(2) read with s 5(1)(a) of the Act it is necessary to prove that a debt exceeding the statutory minimum of RM2,000 is still due and owing to the bank at the date of the hearing of the petition (see *Re Patel (a debtor)* [1986] 1 All ER 522).

[12] Here, before us, the JD alleges that there is an excess of RM6,509.67 claimed in the BN. It must be stated that the BN has been issued in respect of a judgment debt to the tune of RM3,543,401.80. That being the case, even if the sum of RM6,509.67 were deducted from the judgment debt claimed, the amount would still exceed the statutory minimum of RM30,000 as stipulated in s 5(1)(a) of the Bankruptcy Act 1967. It is appropriate to mention that the Federal Court in *Moscow Narodny Bank Ltd v Ngan Ching Wen* [2005] 3 MLJ 693; [2004] 2 CLJ 241 (FC), at p 251 has approved the principles laid down in *Loh Kok Huah, Re: Ex P Ban Hin Lee Bank Bhd*.

[13] The courts, in construing bankruptcy notices, have been inclined to apply the strict construction to the legislative words creating the act of bankruptcy (*Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 (SC); and *Chinery, Re, ex p Chinery* [1884] 12 QBD 342 at p 346 (CA)). The reason for the strict construction is quite simple. Bankruptcy has all along been a creature of statute, the courts are inclined to construe the legislative words strictly.

[14] For the aforesaid reasons, the first ground ought to be rejected forthwith.

THE SECOND GROUND

[15] The JD alleges that the judgment debt appearing in a statement of account which the JC issued is inconsistent with the judgment debt stated in the BN. While it is true that the JD is well out of time to raise such an alleged inconsistency on the authority of *Loh Kok Huah, Re Ex P Ban Hin Lee Bank Bhd*, we will demonstrate that the JD's allegation is without merit.

[16] The statement of account dated 30 October 2009 stipulates that it is the 'Statement of Account for Term Loan and Hire Purchase' and it can be seen at p 355 of vol 3 (Parts B & C) of the record of appeal and it is worded as follows:

STATEMENT OF ACCOUNT FOR TERM LOAN AND HIRE PURCHASE

We refer to your letter dated 23 September 2009 which was received by our Kluang branch on 13 October 2009.

As requested, append below is the Statement of Account as at 30 September 2009 for the term loan and hire purchase accounts:

(i) Term Loan account no. 715-407641-1

Judgment Sum as at 21.1.2009	RM2,357,242.06
Add: Interest thereon on the sum of RM2,357,242.06 at 1.25% p.a. above the Bank's Base Lending Rate and a further 1% p.a. late payment interest on monthly rests from 22.1.2009 to 30.9.2009	RM131,075.72

(ii) Hire Purchase account nos. 115-400343-1 and 115-400393-8

Judgment Sum as at 12.02.2009	RM1,971,228.80
Add: Interest thereon on the sum of RM1,971,228.80 at 1% p.a. from 13.2.2009 to 7.9.2009	RM11,179.30
Interest thereon on the sum of RM1,971,228.80 at 8% p.a. from 8.9.2009 to 30.9.2009	RM9,937.15

Please be informed that the following accounts have been fully settled:

(i) Term Loan account no. 715-400867-2.

(ii) Hire Purchase account nos. 115-400366-0 and 115-400412-8.

[17] The contents of the JC's statement of account dated 30 October 2009 as reproduced above made reference to two separate judgments. The first is a judgment entered for the amount owing as at 21 January 2009 in respect of the term loan and overdraft facility. And the judgment sum for the term loan is RM2,357,242.06. This is identical to the sum claimed in respect of the term loan in Civil Suit No 22–173 of 2009, where at para 27 of the statement of claim the JC has pleaded that the total debt as at 21 January 2009 is RM3,374,988.64, which comprises of RM1,017,746.58 for the overdraft facility and RM2,357,242.06 for the term loan facility. In its original text, para 27 of the statement of claim for Civil Suit No 22–173 of 2009 is worded in this way (see pp 488–489 of vol 4 (Parts B & C) of the record of appeal):

> 27 Walaupun tuntutan dibuat seperti dinyatakan di perenggan 26 di atas, namun demikian defendan pertama gagal untuk membayar jumlah yang dituntut oleh plaintif. Oleh yang demikian, plaintif melalui peguamcaranya telah menghantar notis penamatan bertarikh 23.01.2009 untuk menamatkan Pinjaman tersebut. Melalui notis tersebut, plaintif juga telah menuntut pembayaran balik keseluruhan jumlah yang masih kena dibayar di bawah Pinjaman tersebut iaitu RM3,374,988.64 dikira setakat 21.01.2009, butir-butirnya seperti berikut:
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> 27.1 RM1,017, 746.58 bagi pinjaman overdraf di mana had overdraf yang dibenarkan adalah RM1,000,000.00. Faedah dikenakan ke atas had yang dibenarkan RM1,000,000.00 pada kadar 1.50% setahun di atas Kadar Pinjaman Asas Plaintif (BLR) (pada masa itu BLR adalah 6.50%) dikira atas sandaran bulanan dan ke atas jumlah yang melebihi had overdraf RM 1,000,000.00 pada kadar 2.50% setahun di atas Kadar Pinjaman Asas Plaintif dikira atas sandaran bulanan, kedua-duanya dikira dari 22.01.2009 sehingga tarikh penyelesaian penuh; dan
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> 27.2 RM2,357,242.06 bagi pinjaman terma. Faedah dikenakan ke atas jumlah RM2,357,242.06 pada kadar 1.25% setahun di atas Kadar Pinjaman Asas Plaintif (BLR) (pada masa it BLR adalah 6.50%) dikira atas sandaran bulanan dan faedah ingkar pada kadar 1% setahun kedua-duanya dikira dari 22.01.2009 sehingga tarikh penyelesaian penuh.

[18] Now, the judgment that was obtained in Civil Suit No 22–173 of 2009 is the very foundation for which the BN was issued in this case.

[19] The second judgment as stated in the JC's statement of account dated 30 October 2009 relate to the amount owing as at 12 February 2009 in respect of a hire purchase facility and this judgment was obtained in Civil Suit No 22–398 of 2009. The judgment sum obtained as at 12 February 2009 came up to RM1,971,228.80 and it is identical to the amount stated for the hire purchase facility in the statement of account which the JD refers to. The judgment obtained by the JC in Civil Suit No 22–398 of 2009 dated

7 September 2009 can be seen at pp 467–468 of vol 4 (Parts B & C) of the record of appeal and it is worded as follows:

> PENGHAKIMAN INGKAR
>
> (ATURAN 13 KAEDAH 1 KAEDAH-KAEDAH MAHKAMAH TINGGI 1980)
>
> Tiada kehadiran telah dimasukkan oleh defendan-defendan dalam tindakan ini.
>
> ADALAH PAPA HARI INI DIHAKIMKAN bahawa defendan-defendan hendaklah membayar kepada plaintif:
>
> (1) RM1,971,228.80,
>
> (2) Caj lewat bayar ke atas jumlah RM1,971,228.80 pada kadar 1% setahun dikira dari 13.02.2009 sehingga tarikh penghakiman,
>
> (3) Caj lewat bayar ke atas jumlah RM1,971,228.80 pada kadar 8% setahun dikira dari tarikh penghakiman sehingga tarikh penyelesaian penuh, dan
>
> (4) Kos tindakan ini sebanyak RM225.00.
>
> Bertarikh pada 07 haribulan September 2009.

[20] It is thus apparent that the JD is trying to confuse this court by referring to the statement of account without disclosing to this court the fact that the borrower had taken several loan facilities from the JC bank and that the statement of account refers to only a part of the loan facilities. It is also apparent that the JD purposely failed to disclose the fact that the statement of account relates only to the amount owing under the term loan facility whereas the judgment on which the BN is issued pertained to both the term loan and the overdraft facilities. In our judgment, the JD is content to provide half-truths or misinformation to this court and the only reasonable inference to be drawn from the conduct of the JD is that the JD is trying to mislead this court.

[21] Learned counsel for the JC in the person of Dr Clarence Edwin rightly submitted that the second ground is baseless and misconceived. He ventured to say that in light of the JD's penchant for being untruthful, his averments have no credibility. We wholeheartedly agree. Consequently, the second ground must be rejected by this court.

THE THIRD GROUND

[22] It is the contention of the JD that the JC has a charge over the borrower's property and that that charge exceeds the amount claimed in the BN. Flowing from this, the JD submits that the bankruptcy action should fail.

[23] The facts must be put in its correct perspective. The JD is a guarantor.

The charge is in respect of the borrower's property, not that of the JD. This brings into sharp focus s 5(2) of the Bankruptcy Act 1967 which enacts as follows:

> 5 Conditions on which creditor may petition.
>
> (2) If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

[24] A pertinent question arises. Who is a 'secured creditor'? The answer is found in s 2 of the Bankruptcy Act 1967 where a 'secured creditor' is defined as:

> … a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment; …

[25] At this juncture, it is ideal to refer to the case of *Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan* [1993] 2 MLJ 423; [1993] 3 CLJ 349, a decision of the Supreme Court. There His Lordship Mohd Azmi bin Hj Kamaruddin SCJ speaking for the Supreme Court held that in order for a petitioning creditor to be classified as a 'secured creditor', the property held as security must be the property of the judgment debtor himself and not that of a third party. In that case, the petitioning creditor/bank held security over the property of the borrower and in the bankruptcy proceedings initiated against the guarantor, the guarantor argued that the petitioning creditor breached s 5(2) of the Bankruptcy Act 1967 for failing to disclose the charge over the borrower's property. His Lordship Mohd Azmi bin Hj Kamaruddin SCJ rejected this argument and laid down the law as follows (see pp 432–433 (MLJ); 354–355 (CLJ) of the report):

> In *Re Rabindera Singh s/o Arjan Singh Ex Parte: Malaysian International Bankers Bhd* [1989] 2 CLJ 858, Siti Norma Yaccob, J. citing the case of *Exparte West Riding Union Banking Company* [1881] 19 Ch. D. 108, held at page 859:
>
> > From the definition, it is clear that the requirement to state the petitioner's willingness to give up the security or give the value of the security in the petition under section 5(2) only applies where the security is supplied by the debtor himself and not by some other third party.
>
> In the petition before Her Ladyship, the debtor in the judgment creditor's petition whose liability arose as a guarantor, did not provide for the security but was given by the principal borrower (which is similar to the present appeal). For that reason, it was held that the requirement of section 5(2) did not apply.

But in a latter case, Shaik Daud, J. In *The Hongkong & Shanghai Banking Corporation v Yip Kim Khoon* [1991] 3 MLJ 172; [1991] 2 CLJ 1631 would appear to hold the opposite view. In giving a wider meaning to the word 'debtor' in the section 2 definition of the term 'secured creditor', His Lordship held at p. 1632:

> Counsel for the creditor contends that since the property did not belong to the debtor in this petition but to a third party there is no need to mention this in the petition. He contends that in s. 5(2) of the Act it talks of property of debtor and this means the principal debtor. He cited s 94 of the Contracts Act 1950. With respect this section does not help the creditor because it gives the surety (as the judgment debtor in this petition is) entitlement to the benefit of every security which the creditor has against the principal debtor. Thus in this petition the judgment debtor (Yip Kim Khoon) is entitled to the benefit of the security (the assigned property) which the creditor has against the principal debtor (Bornion Company (Kuala Lumpur) Sendirian Berhad). In any case I feel that the word debtor in s. 5(2) of the Act must be given a wider meaning then (sic)(than) just the principal debtor. A surety against whom a judgment had been entered is for all intents and purposes a debtor to the judgment creditor.

We did not know why *Rabindera Singh* case was not cited or discussed in *Yip Kim Khoon*. Mr. Lingam, Counsel for the respondent had urged us to reject *Rabindera Singh* and to adopt *Yip Kim Khoon*. We disagreed. In our view, what was crucial here was to determine whether under s. 5(2) the appellant Bank as a petitioning creditor was a 'secured creditor' not in the Loan Agrement with the principal borrower, but under the Contract of Guarantee with Mr. Samuel from which had emanated Mr. Samuel's liability in the Order 14 judgment and upon which in turn the Bankruptcy Notice and Petition were based. In short, Mr. Samuel was the only 'debtor' in the bankruptcy proceeding before the Court on account of the judgment, and his alleged act of bankruptcy was governed by section 3(1)(i) for non-compliance with a bankruptcy notice. In the circumstances, we are of the opinion that the word 'debtor' appearing in both ss. 2 and 5(2) must mean and should be limited to the actual 'debtor' involved in the particular bankruptcy proceeding and should not include any other debtors that may exist. Thus, in this particular petition, to clothe the appellant Bank as a 'secured creditor' under s. 5(2), it must be shown that the appellant Bank was holding a mortgage, charge or lien on the property of Mr. Samuel, as a security for the debt of RM11.2 million due to the Bank from Mr. Samuel. It was common ground that Mr. Samuel had not given any security to the bank for his debt as a guarantor. Both the landed security and debenture, were admittedly given by the Principal Borrower and none by Mr. Samuel. In fact the contract of guarantee executed by Mr. Samuel was a third form of collateral or security given to the Bank in addition to the landed charge and debenture. Thus, in this particular bankruptcy proceeding as far as Mr. Samuel was concerned, the appellant Bank was not a secured creditor within the meaning of s. 5(2), and as such non-compliance with its requirement could not be fatal to the Petition. Further, the 'wider' or liberal interpretation of s 5(2) advocated by Shaik Daud, J. was a serious departure from the established principle of strict interpretation of bankruptcy legislation (see Halsbury's Laws of England, Vol. 3(4th Edn.) at pp. 161, 162 and

Low Mun v Chung Khiaw Bank [1988] 1 MLJ 263, at 265). We accordingly approved the judgment of Siti Normah, J. in Rabindera Singh in preference to *Yip Kim Khoon*.

[26] Mr Lam Wai Tze for the JD cited and relied on the case of *Yip Kim Khoon v The Hongkong & Shanghai Banking Corp* [1991] 4 CLJ (Rep) 297. With respect, that case is no longer good law as the Supreme Court has expressly overruled that case in *Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan*.

[27] The terms of the contracts of guarantee favoured the JC. It provides that the JC has the right to demand payment from the guarantor even if the JC has not resorted to other means of payment. Reference will now be made to cl 17 of the letter of guarantee dated 15 August 2002 at p 499 of Vol 4 (Parts B & C) of the record of appeal, cl 17 of the letter of guarantee dated 22 November 2004 at p 511 of Vol 4 (Parts B & C) of the record of appeal and cl 16 of the letter of guarantee dated 16 May 2006 at pp 523–524 of Vol 4 (Parts B & C) of the record of appeal. These clauses are similarly worded and as an example, cl 17 of the letter of guarantee dated 15 August 2002 at p 499 of Vol 4 (Parts B & C) of the record of appeal, will now be reproduced:

> 17 *You are at liberty but are not bound to resort* for your own benefit or otherwise *to any other means of payment at any time and in any order think fit without thereby diminishing the liability of the Guarantor* hereunder *and you may enforce this instrument* and your rights and remedies hereunder either for the payment of the ultimate balance after resorting to other means of payment or for the balance due at any time *notwithstanding that other means of payment have not been resorted to and in the latter case without entitling the Guarantor to any benefit from such other means of payment* so long as any monies remain due or owing from the Borrower to you and in addition you shall be at liberty to require payment by the Guarantor of any monies due or owing to you without taking proceedings first to enforce such payment by the Borrower or any other person or party.

[28] The words employed in cl 17 of the letter of guarantee dated 15 August 2002 are clear and unambiguous and effect must be given to them. What it amounts to is this. That the JC is not bound to resort to any other means of payment and can claim the full debt directly from the JD as the guarantor regardless of any other remedy available to the JC.

[29] Here, the JC had granted several loans/facilities to a company known as Air Hitam Pottery Sdn Bhd (Company No 270406-D) ('the company') and the JD is one of the five guarantors for the said facilities. The company had defaulted in the repayment of the said facilities and judgment in default of

appearance dated 1 April 2009 had been entered against the company as reflected at pp 268–269 of Vol 3 (Parts B & C) of the record of appeal and it is worded as follows:

> PENGHAKIMAN INGKAR
>
> (ATURAN 13 KAEDAH 1 KAEDAH-KAEDAH MAHKAMAH TINGGI 1980)
>
> Tiada kehadiran telah dimasukkan oleh defendan-defendan dalam tindakan ini.
>
> ADALAH PADA HARI INI DIHAKIMKAN bahawa defendan-defendan hendaklah membayar kepada plaintif:
>
> (1) RM3,374,988.64,
>
> (2) Faedah ke atas RM1,000,000.00 pada kadar 1.50% setahun di atas Kadar Pinjaman Asas Plaintif dikira atas sandaran bulanan dari 22.01.2009 sehingga tarikh penyelesaian penuh,
>
> (3) Faedah ke atas jumlah yang melebihi had overdraf RM1,000,000.00 pada kadar 2.50% setahun di atas Kadar Pinjaman Asas Plaintif dikira atas sandaran bulanan dari 22.01.2009 sehingga tarikh penyelesaian penuh,
>
> (4) Faedah ke atas RM2,357,242.06 pada kadar 1.25% setahun di atas Kadar Pinjaman Asas Plaintif dikira atas sandaran bulanan dari 22.01.2009 sehingga tarikh penyelesaian penuh,
>
> (5) Faedah ingkar ke atas RM2,357,242.06 pada kadar 1% setahun dikira atas sandaran bulanan dari 22.01.2009 sehingga tarikh penyelesaian penuh, dan
>
> (6) Kos tindakan ini sebanyak RM225.00.
>
> Bertarikh pada 1 haribulan April 2009.

[30] It is onerous to be a guarantor. The authorities indicate that a guarantee is a binding promise of one person to be answerable for the debt or obligation of another if that other defaults (*Sunbird Plaza v Maloney* (1988) 166 CLR 245; *Yeoman Credit Ltd v Latter & Anor* [1961] 1 WLR 828 (CA); *Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd* [1965] NSWR 1504; *Total Oil Products (Aust) Pty Ltd v Robinson* (1970) 1 NSWR 701; *General Surety and Guarantee Co Ltd v Francis Parker Ltd* [1977] 6 BLR 16; *Re Richards; Ex parte Lloyd, Official Receiver* (1935) 8 ABC 37; *WC Angliss Co (Aust) Pty Ltd* (1935) 8 ABC 37; *Browning And Another, Assignees of Morgan, a Bankrupt v Stallard* (1814) 128 ER 764; *Commercial Banking Co of Sydney Ltd v Patrick Intermarine Acceptances Ltd* (1978) 52 ALJR 404 (PC), at p 406; and *Western Dominion Investment Co v MacMillan* (1925) 2 DLR 442, affirmed in [1925] 4 DLR 562 (CA)).

[31] In *Jowitt v Callaghan* (1938) 38 SR (NSW) 512, Jordan CJ described the meaning of a contract of guarantee in this way:

> The contract of guarantee or suretyship is a contract between two persons which is intended by them to secure the performance of the obligation of a third person to one of them. The existence, present or future, of the obligation of a third person, and an intention in the parties to the contract to secure the performance of that obligation, are essential features of a contract of guarantee.

[32] Thus, a contract of guarantee is predicated upon the existence of a valid principal obligation owed by the principal debtor (*Swan v The Governer and Company of the Bank of Scotland* (1836) 10 Bligh NS 627, 6 ER 231 (HL); *Lougher And Others v Molyneux* [1916] 1 KB 718; and *Joseph P Morin v The Hammond Lumber Company* [1923] 1 DLR 140 (SC)). In the context of the present appeal, the principal debtor would be the company.

[33] Claiming the full debt directly from the JD as the guarantor was the approach adopted by the JC. Such an approach was approved by Mahadev Shanker J (later JCA) in the case of *Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor* [1988] 2 MLJ 471; [1988] 1 CLJ (Rep) 793, and this was what His Lordship said at p 472 (MLJ); 794 (CLJ) of the report:

> So far as the 2nd defendant was concerned Clause 3 of the guarantee provided that all monies due from the company could nevertheless be recoverable from (him) as principal debtor, and Clause 4 provided that the guarantee was in addition to and not in substitution for any other rights which the bank may have had under the charge. Clearly therefore it was open to the Bank to proceed simultaneously against the 2nd defendant as well.

[34] The same approach was also approved by Edgar Joseph Jr J (later FCJ) in *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175; [1988] 1 CLJ (Rep) 770. There, at p 184 (MLJ); 782 (CLJ) of the report, His Lordship had this to say:

> As if to put the matter beyond doubt, the last sentence of Clause 5 provides that 'The Society shall not be bound or required to proceed against the security first before enforcing this guarantee against the guarantors'.

[35] In our judgment, the JC has the option and is free to pursue all remedies available either simultaneously or successively. In this connection, reference should be made to the case of *Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478; [2009] 6 CLJ 81, a decision of the Federal Court. There, Gopal Sri Ram FCJ writing for the Federal Court had this to say at p 484 (MLJ); p 91 (CLJ) of the report:

A We would reiterate that a lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary.

B **[36]** For these brief reasons, the third ground must also be rejected.

THE FOURTH GROUND

[37] Based on the arguments and the reasonings governing the third ground C which must apply to the fourth ground, this ground must also fail.

THE FIFTH GROUND

[38] The JD contends that the orders for substituted service of the BN and D the CP are irregular because the JD allegedly did not receive any letter of appointment fixing the day and time for service of the BN and CP respectively.

[39] We propose to review the affidavits of non-service filed in respect of the E BN and the CP. This is the best approach to adopt in determining the validity of the orders for substituted service of both the BN and the CP.

[40] The relevant affidavit of non-service of the BN is the affidavit of Shanti a/p Selvanayagam that was affirmed on 6 October 2009 and it can be seen at F pp 46–48 of the vol 1 (Parts B & C) of the record of appeal. Shanti, the process server, affirmed in her affidavit that two attempts were made to serve the BN on the JD. Both attempts were unsuccessful. A letter of appointment dated 15 September 2009 was then sent via registered post to fix an appointment for service of the BN. Unfortunately, on the date of the appointment, the JD was G absent and was not seen at his address for service.

[41] The affidavit of non-service of the CP would also be the affidavit of Shanti a/p Selvanayagam that was affirmed on 23 February 2010 as seen at pp 54–56 of vol 1 (Parts B & C) of the record of appeal. There, Shanti as the H process server deposed that she made two attempts to serve the CP but to no avail. A letter of appointment was then sent via registered post to the JD for him to fix an appointment. Unfortunately, the JD was not at his address on the appointed time and day for service.

I **[42]** It is germane to mention that one of the two addresses where the letters of appointment were sent is house Number 15, Jalan Bunga Raya 2, Kampung Macap, 86200 Simpang Renggam as seen at pp 126–135 of vol 2 (Parts B & C) of the record of appeal. This address is identical to the address which the JD states in his affidavits filed in the court below as seen at p 65 of vol 1 (Parts B

& C) of the record of appeal. It must also be emphasised that proof of posting of the letters have been exhibited in both the affidavits of non-service. The proof of posting was in the form of an official stamp from the postal authority acknowledging receipt of the letters in question. It must be borne in mind that the authenticity of these documents from the postal authority has not been challenged.

[43] At this juncture, it is necessary to point out that the JD does not challenge the mode of delivery of the letter of appointment. Legally speaking, the JD cannot do so because the law as stated in s 130 of the Bankruptcy Act 1967 prohibits him from doing so. That section enacts as follows:

> 130 Service of notices.
>
> All notices and other documents for the service of which no special mode is prescribed may be sent by prepaid registered post letter to the last known address of the person to be served therewith.

[44] The JD signed cll 23 and 33(a) of the letters of guarantee which governed the mode of giving the notice of demand. Clause 23 of the letters of guarantee dated 15 August 2002 and 22 November 2004 can be seen at pp 304 and 316 of vol 3 (Parts B & C) of the record of appeal while cl 33(a) of the letter of guarantee dated 24 April 2006 can be seen at p 334 of vol 3 (Parts B & C) of the record of appeal. Clause 23 states as follows:

> 23 *Any notice* or demand in relation to the matters aforesaid *may be effectually given* or made *to the Guarantor by notice in writing* under the hand of any of your officers or solicitors or agents for the time being *and* either *served* personally on the Guarantor or left for or sent *by post to the Guarantor* at the address herein stated or at the last known address or place of business or residence of the person to be served *and a notice* of demand *so given* or made *shall be deemed to be given* or made *on* the day it was so left or *the day following that on which it was posted*, as the case may be, *notwithstanding that such notice* or demand *may be returned to you by the postal authorities* or otherwise *undelivered*.

[45] While cl 33(a) stipulates that:

> 33 Communication, notice and demand
>
> (a) Any notice, demand or service of process for payment of the monies intended to be hereby secured may be made by a notice in writing requiring payment within seven (7) days from the date thereof and may be signed on your behalf by any of your officers or by any solicitor or firm of solicitors purporting to act for you and such notice shall be deemed to have been sufficiently served on the Guarantor(s) if it is left at the usual or last known place of residence or business or at the address of the Guarantor(s) set out in this instrument or *sent by registered letter* or ordinary mail to any of such addresses or sent by telex or facsimile to any telex/facsimile numbers of

A the Guarantor(s). In the case of posting, the *service shall be deemed to be made within three (3) Business Days from posting if posted within Malaysia* and five (5) Business Days from the date of posting if posted out of Malaysia, in the case of telex, the service shall be deemed to be made immediately upon transmission thereof and confirmed by answerback and in the case of facsimile, on production of a transmission report by the machine from which the facsimile was sent.

B

Where any judgement or order had been obtained against the Guarantor(s) or any of them, service of the judgment or order shall be deemed to have been duly served on the Guarantor(s) by leaving it at the usual or last known place of residence or business or at the address of the Guarantor(s) set out in this instrument or by sending it by registered letter or ordinary mail to any of such addresses.

C

[46] In giving effect to the contractual provisions governing the service of documents, His Lordship Mohamed Dzaiddin bin Hj Abdullah SCJ (later the Chief Justice of Malaysia) writing for the Supreme Court in the case of *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413; [1994] 2 CLJ 1, at p 420 (MLJ); pp 4–5 (CLJ), aptly said:

D

Therefore, on the proper construction of cl 17, since any notice may be served by sending the same through the post addressed to the last known address of the addressee, in our view, the deeming provision applies to the said notice, whether or not it is sent by AR registered post. Clause 17 does not provide that the notice should either be sent by registered post or AR registered post, and the fact that these words were ommitted from cl 17 cannot justify the court reading those words in cl 17 as was done by the learned judge. In the context of cl 17 of the said guarantee, we are further of the view that it is not necessary that the appellant must show that the AR card has been returned duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established, the deeming provision will inevitably apply.

E

F

G

[47] Applying the above mentioned authority and cll 23 and 33(a) of the letters of guarantee, it is our judgment that the letters of appointment are deemed to have been served on the JD. And since the JD failed to keep the appointments, he must be taken to be evading service.

H

[48] By way of a rebuttal, the JD advances an argument that a search done at the website maintained by the postal authority on the registered letters returns a negative result, 'Your Reference Number does not exist!' But, there is no affidavit emanating from any officer of the postal authority to explain this negative response. The JC has averred in para 5.3 of its affidavit in reply as seen at p 83 of Vol 1 (Parts B & C) of the record of appeal that due enquiries were made with the postal authorities and it was disclosed that the website only holds records for a period of six months from the date of posting. In light of this

I

piece of evidence, the JD merely gave a bare denial. We call in aid s 90A(2) of the Evidence Act 1950 which enacts as follows:

> 90A Admissibility of documents produced by computers and of statements, contained therein.
>
> (2) For the purpose of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

[49] This is an interesting section. It allows a statement in a computer record to be admitted as evidence provided it was recorded in the course of the ordinary use. The person who is responsible for the operation of the computer will issue a certificate stating that to the best of his knowledge and belief, it was made in the course of the ordinary use. Ian Chin J (as he then was) in *Standard Chartered Bank v Mukah Singh* [1996] 3 MLJ 240 held the view that only if the evidence was challenged as to its admissibility then it became necessary to produce a certificate under s 90A(2) of the Evidence Act 1950.

[50] The Federal Court had occasion to consider the ramifications of s 90A(2) of the Evidence Act 1950 in the case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 (FC). There, Zulkefli Makinudin FCJ (now the Chief Judge of Malaya) writing for the Federal Court had this to say at pp 638–639 (MLJ); pp 830–831 (CLJ) of the report:

> (33) I agree with the views expressed in the above passages from *Hanafi Mat Hassan v Public Prosecutor* in the analysis of section 90A. In substance therefore the fact that a document was produced by a computer in the course of its ordinary use may be proved by the tendering in evidence of a certificate under section 90A or by way of oral evidence. Such oral evidence must consist not only a statement that the document was produced by a computer in the course of its ordinary use but also the matters presumed under section 90A(4). On the other hand the presumption contained in section 90A(6) can be resorted to only when the document was not produced by a computer in the course of its ordinary use.
>
> (34) In this case no certificate was tendered as required by section 90A(2) for proof of the chemist report (P83). Neither was any oral evidence adduced to show that the report was produced by a computer in the course of its ordinary use. It therefore remains that the only evidence available is that the report was produced by a computer. It is thus appropriate to resort to section 90A(6) to presume that the report was produced by the computer in the course of its ordinary use. With regard to proof of the matters under section 90A(4) the oral evidence of PW27 is relevant when he said:
>
> > Saya tidak setuju saya tidak boleh sahkan computer, program dan kit DNA itu tidak berfungsi dengan teratur (proper working order). Saya boleh sahkannya. Sekurang-kurangnya saya telah buat ujian enam kali dengan genotyper dalam kes

ini. Sebelum buat ujian saya telah periksa samada computer itu dalam keadaan baik atau tidak (see p 338 of the appeal records).

The chemist report (P83) is therefore admissible in evidence.

[51] Likewise here, the JD has not produced any such certificate as required by s 90A(2) of the Evidence Act 1950. In the absence of such a certificate from the postal authority, not much weight can be attached to the computer print out that the JD has produced. To compound the matter further, the JD has evaded service and this is reflected in exh 'PL1' at pp 343–348 of Vol 3 (Parts B & C) of the record of appeal. This exhibit is an eye opener. It shows the remarks from the postal authority concerning the delivery of the letters of appointment for service of the CP. The postal authority attempted delivery of the letter on 4 February 2010 but it was unsuccessful. The JD's residence was closed. The remark 'tutup' appeared on the retour card. The postal authority left notice at the JD's address to collect the letter and the postal authority kept the letter from 4–18 February 2010 — for two weeks, to give a chance to the JD to collect it. But, unfortunately, the JD did not collect the letter. The remark on the retour card showed 'tidak dituntut/unclaimed'.

[52] The JD did not advance a concrete answer for his failure to collect the letter from the postal authority. He relies on his website search results but that is not the best evidence to rely upon. The best evidence would be the mail delivery duly returned by the postal authority with their signature, postmark and remarks concerning the attempted delivery.

[53] The JD alleged that he could not collect the letter from the postal authority because he had no knowledge about it. This allegation is totally absurd. Any reasonable man would know that when the postal authority attempts service of a registered letter or parcel and finds the recipient unavailable, a notice is left at the address of the recipient. This notice will state that an attempt at delivery was made but was unsuccessful and that the registered letter or parcel would be kept at the post office for a certain period of time to enable the recipient to collect the item personally. This court can take judicial notice of this because it is so sufficiently notorious that it becomes proper to assume its existence without proof (*Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153 (FC); *Re KO (an infant)* [1990] 1 MLJ 494 (HC); *Lee Weng Sang v Public Prosecutor* [1978] 1 MLJ 168 (FC); *Lee Lip Ngee v Crown Counsel* [1947] 13 MLJ 68 (HC); *Lee Chow Meng v Public Prosecutor* [1976] 1 MLJ 287 at p 288 (HC); *Lim Kong v Public Prosecutor* [1962] 1 MLJ 195 at p 197 (HC); *Yong Pak Yong v Public Prosecutor* [1959] 1 MLJ 176 at p 177 (HC); *Public Prosecutor v Choo Teck Heng* [1960] 1 MLJ 218 at p 219 (HC); *Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129 at p 131 (FC); *Kong Nen Siew v Lim Siew Hong* [1971] 1 MLJ 262 at p 263 (HC);

Balakrishnan s/o Kunjamboo Nair v Savastine Anthony s/o Francis [1991] 1 CLJ 503 at p 506 (HC); and *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 at pp 31–32 (SC)).

[54] It is correct to say that the JD clearly failed to collect the letter of appointment from the postal authority despite knowing that there was a letter for him. This, in our judgment, is an unmistakable evidence of the JD's attempt to evade service. Given the prevailing facts, the JC had sufficient basis to make the application for substituted service. It deserves repetition to say that the JC need only make two attempts at service prior to applying for substituted service. Here, the JC in abundance of caution made three attempts. It must be recalled that two calls were made prior to fixing an appointment for a third call.

[55] Since the proper procedure for service was complied with and there was sufficient basis to conclude that the JD was avoiding service, the order for substituted service was properly obtained. This is our judgment and we so hold accordingly.

THE SIXTH GROUND

[56] In advancing this ground, learned counsel for the JD relies on r 94 of the Bankruptcy Rules 1969. That cannot be right. Rule 94 deals specifically with the particulars to be endorsed on a bankruptcy notice and that would include the name and address of the solicitors for the JC. In this case, the BN states the name and address of the JC's solicitors.

[57] The relevant provisions dealing with substituted service of the BN and the CP are rr 97 and 110 of the Bankruptcy Rules 1969. These rules state as follows:

> Rule 97 Service of notice
>
> A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition.
>
> Rule 110 Substituted service
>
> (1) If the Court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be affected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause it may order substituted service to be effected in such manner as it thinks fit.
>
> (2) Where any such order has been carried out the petition shall be deemed to have been duly served on the debtor.

[58] The rules provide a prescribed form as to how the advertisement should

be done. That form is Form 15 of the Bankruptcy Rules 1969. And according to the decision of this court in the case of *David Lim Hong Kee v Perwira Affin Bank Bhd*, an advertisement of BN or CP must take the form as set out in Form 15. In the words of Mohd Ghazali Yusoff JCA (later FCJ) who delivered the decision of this court at p 50 (CLJ):

> In the instant case, it is the order of the court that the bankruptcy notice on the appellant be served and effected by advertisement in the *Daily Express* and that such service shall be deemed good and sufficient service of the bankruptcy notice on him. The form of the advertisement followed the format in Form 15. It was also stated in the advertisement that the bankruptcy notice can be inspected by the appellant on application to the court. The method employed to effect the substituted service was not inconsistent with the order of the court. It was sufficient to bring knowledge of the bankruptcy notice to the appellant.

[59] Likewise in the present case, the advertisements of the BN and the CP were in Form 15. There is no requirement in Form 15 that the name and address of the JC's solicitors ought to be inserted. In our judgment, using the decision of this court in *David Lim Hong Kee*'s case, the service in this case was properly done.

[60] In our judgment, the JD failed to demonstrate any cogent reason in law to set aside the BN and the CP or for that matter the service thereof, or to advance any reason as to why a receiving order and an adjudicating order ought not to have been granted. Kamardin Hashim JC (now judge) in *Re Tunku Abdul Jalil Ibni Tunku Osman, Ex parte Malayan Banking Berhad* [2010] 1 LNS 21 had occasion to deal with the same arguments advanced by the debtor in that case and we gratefully adopt and agree with what His Lordship said in that case:

> 19. Setelah meneliti semua kertas kausa dalam kes ini, saya bersetuju dengan hujahan oleh peguamcara JC. Saya mendapati kesemua isu yang dibangkitkan oleh peguamcara JD dalam rayuan ini tidak bermerit dan wajar ditolak. Kes-kes otoriti yang dirujuk oleh peguamcara JC menyokong keputusan penolong kanan pendaftar dalam menolak permohonan JD untuk mengenepikan notis kebankrapan. Keputusan penolong kanan pendaftar tersebut adalah betul dan tiada alasan untuk mahkamah ini untuk menyimpang dari keputusan tersebut. Penghakiman yang disandarkan oleh JCA di sini adalah satu penghakiman yang regular dan ianya sah dan berkuatkuasa sehingga diketepikan oleh mahkamah atasan. Tiada rayuan dikemukakan oleh JD terhadap keputusan Mahkamah Tinggi bertarikh 12 Oktober 2009 yang menolak permohonan JD untuk mengenepikan penghakiman tersebut.
>
> 20. Permohonan JD untuk mengenepikan notis kebankrapan di sini telah difailkan terlalu lewat, lebih daripada lima tahun selepas penolakan rayuan. Permohonan JD untuk mengenepikan penghakiman juga difailkan terlalu lewat iaitu selepas notis kebankrapan diserahkan kepada beliau. Isu bahawa peguamcara terdahulu tiada

otoriti tidak dibuktikan dan hanyalah satu pemikiran terkemudian kerana isu ini hanya timbul selepas notis kebankrapan diserahkan. Selain itu notis membantah kepada notis kebankrapan hanya difailkan dan diserahkan oleh JD kepada JC hampir satu tahun selepas notis kebankrapan diserahkan. Tindakan ini di luar tempoh masa tujuh hari yang diberikan kepada JD untuk berbuat demikian.

21. Bantahan JD terhadap jumlah tuntutan melebihi had jaminan, jumlah hasil jualan hartanah tidak diambil kira dan jumlah tuntutan meragukan juga tidak berasas. Kesemua bantahan ini telah dijawab dengan jelas dan disokong oleh nas-nas dan keterangan dokumentar. Begitu juga bantahan terhadap serahan ganti adalah tidak berasas oleh kerana telah terbukti terdapat keterangan menunjukkan bahawa JD telah cuba untuk mengelakkan dari serahan kediri. Walaupun melalui surat temujanji serahan kediri telah gagal dilakukan. Walau apapun, notis kebankrapan telah sampai ke pengetahuan JD dan dengan itu isu serahan ganti adalah remeh dan tidak wajar diterima serta bukan satu isu lagi yang harus diberikan perhatian oleh mahkamah.

CONCLUSION

[62] For these varied reasons, we unanimously dismissed both appeals with costs of RM10,000 for each appeal. We affirmed the decisions of the High Court. Deposits should rightly go to the JCs (the respondent banks).

CIVIL APPEAL NO J-03(IM)-2–01 OF 2012

[61] Since the facts in this appeal are based on the same set of facts with that of Civil Appeal No J-03(IM)-1–01 of 2012, we do not propose to regurgitate the same arguments bearing in mind that the parties agreed to have these two appeals to be heard together.

Appeals dismissed.

Reported by Afiq Mohamad Noor